

2009

Medical Tourism: The Commodification of Health Care in Latin America

Angeleque Parsiyar

Follow this and additional works at: <https://scholar.smu.edu/lbra>

Recommended Citation

Angeleque Parsiyar, *Medical Tourism: The Commodification of Health Care in Latin America*, 15 LAW & BUS. REV. AM. 379 (2009)
<https://scholar.smu.edu/lbra/vol15/iss2/7>

This Comment and Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

MEDICAL TOURISM: THE COMMODIFICATION OF HEALTH CARE IN LATIN AMERICA

Angeleque Parsiyar*

I. INTRODUCTION

PATTY Sanden from North Bend, Oregon desperately needed a hysterectomy, but with the rising medical costs in the United States, she could not afford the procedure at home.¹ Instead, Patty found a booking agency online to assist her in finding an affordable destination with prescreened doctors and hospitals.² She was sent to Costa Rica to undergo the surgery—everything went well, and she saved at least \$13,000.³ This type of travel-surgery combination has been coined “medical tourism,” and Patty is just one of the millions of medical tourists across the world who has journeyed abroad for medical care to obtain the results she needed for a fraction of the price.

Shopping abroad for medical care is not a new trend. Americans have long traveled to Latin American destinations like Brazil to obtain lower-cost cosmetic surgery, such as tummy tucks, face lifts, or other procedures not covered by their health insurance.⁴ Those living near the border have sought out cheaper prescription drugs and dental work in Mexico for many years.⁵ But the idea of Americans traveling to other nations’ resort hospitals for treatment of serious medical conditions is more recent—a trend stemming from both necessity of medical care and easy access to information through the Internet.⁶

So what exactly possesses people to undergo surgery in places where most people would not even drink the water? Many factors may lead to this decision, but the main reasons are cost and insurance downfalls. In

* Angeleque Parsiyar, J.D., cum laude, Southern Methodist University Dedman School of Law, 2008; B.A., double major in Government and Sociology, University of Texas at Austin, 2003. I would like to thank my family for their endless love and support.

1. Jennifer Wolff, *Passport to Cheaper Health Care?*, GOOD HOUSEKEEPING, http://www.goodhousekeeping.com/health/cheaper-health-care-1007?click=main_sr.

2. *Id.* at 3.

3. *Id.*

4. Howard D. Bye, *Shopping Abroad for Medical Care: The Next Step in Controlling the Escalating Health Care Costs of American Group Health Plans?*, 19 NO. 5 HEALTH L., 30, 30 (2007).

5. *Id.*

6. *Id.*

2005 alone, approximately 500,000 uninsured or underinsured Americans traveled to a foreign country in order to obtain health care services.⁷ In determining a destination to undergo treatment, Latin American countries have a particular draw for Americans seeking inexpensive medical care without a trans-Pacific flight.⁸

This paper will address the various issues posed by the rapidly growing medical tourism market, particularly in Latin America, and the consequences of governmental action or inaction with regard to Americans accessing these nations' health care systems. Part II describes the history of medical tourism and traveling to obtain health care services in general. It also discusses the reasons for the dramatic growth in the trend and the present effort of Latin American countries to become more recognized and accepted in the market. Part III examines the possible advantages and benefits of the market and compares the costs of surgeries in the United States with those in certain Latin American countries. Part IV addresses the disadvantages and critiques of medical tourism, including the various safety issues, lack of governmental safeguards ensuring quality of care, and possible social costs in destination countries. Part V examines the legal and political implications and challenges that are involved in traveling to a foreign nation to obtain medical care, including the likely lack of legal recourse, the options of insurance carriers, and the lack of an international regulatory scheme for the industry. Finally, this paper will address where the market is likely to go from here and examines the inevitable effects of its continuing growth, including possible efforts to regulate the practice, likely effects on health insurance plans, and other probable efforts to provide some sort of legal redress for those patients who receive substandard care.

II. MEDICAL TOURISM GENERALLY

"Medical tourism" (sometimes called "health tourism"), a term aptly coined by travel agencies, describes the practice of traveling to a foreign country with the principal purpose of obtaining medical services, but usually with the added bonus of sight-seeing or vacationing.⁹ According to some scholars, the term encompasses "specific medical intervention."¹⁰ Thus, those who become sick or injured while traveling abroad for other reasons are generally not considered medical tourists.¹¹ Most medical

7. Kerrie S. Howze, *Medical Tourism: Symptom or Cure?*, 41 GA. L. REV. 1013, 1017 (2007).

8. Becca Hutchinson, *Medical Tourism Growing Worldwide*, UDAILY (Univ. of Delaware), July 25, 2005, available at <http://www.udel.edu/PR/UDaily/2005/mar/tourism072505.html>.

9. See Howze, *supra* note 7, at 1014.

10. Sara Caballero-Danell & Chipu Mugomba, *Medical Tourism and its Entrepreneurial Opportunities: A Conceptual Framework for Entry Into the Industry*, 2 (Jan. 2007) (unpublished M.B. thesis, Goteborg University), available at http://guoa.ub.gu.se/dspace/bitstream/2077/4671/1/2006_91.pdf.

11. Nicolas P. Terry, *Under-Regulated Health Care Phenomena in a Flat World: Medical Tourism and Outsourcing*, 29 W. NEW ENG. L. REV. 421, 423 (2007).

tourism procedures are planned in advance, and today, they usually involve the assistance of a medical tourism agency or Internet concierge service.¹²

The three major sectors of health tourism are: (i) essential critical or routine surgeries, including procedures such as heart bypasses, cancer therapies, organ transplants, hip replacements, eye surgery, dental surgery, or any other procedure to remedy an injury or medical condition or treat an illness; (ii) elective plastic or cosmetic surgeries, such as tummy tucks and face lifts; and (iii) health spas and holistic treatments like wellness therapies.¹³ This paper will mainly focus on the former two categories (those more traditionally called “medical tourism”) and as such will generally use the terms health tourism and medical tourism interchangeably.¹⁴

A. THE HISTORY OF MEDICAL TOURISM

While term “medical tourism” is relatively new, traveling to obtain health care services is not, and the industry is gaining increased attention as the market continues to grow. The medical tourism market has never fared as well as it has in recent years, mostly because international travel is now safe, speedy, and inexpensive enough to support the expansive, across-the-globe market.¹⁵ Currently, the global health care industry is valued at \$2.8 trillion, for which health tourism comprises approximately \$67 billion,¹⁶ a figure that is growing at about 20 percent per annum.¹⁷

While the numbers have never been this high, health tourism is not new—it has existed throughout history.¹⁸ In ancient Greece, patients traveled throughout the Mediterranean for spiritual healing and other

12. See *id.* at 422.

13. Introduction to S. Rajagopalan, *Health Tourism: An Emerging Industry*, available at <http://202.131.96.59:8080/dspace/bitstream/123456789/221/1/Health+Tourism++An+Emerging+Industry++Rajagopalan.pdf>; see also Caballero-Danell & Mugomba, *supra* note 10, at 2, 19.

14. Medical tourism is actually a subset of health tourism, and the third category of health tourism mentioned above is another subset of health tourism (called “wellness tourism”). Caballero-Danell & Mugomba, *supra* note 10, at 2. To avoid confusion, this article refers to the first two categories as both health tourism and medical tourism and does not distinguish between the two when making generalizations regarding medical tourism.

15. Levi Burkett, *Medical Tourism: Concerns, Benefits, and the American Legal Perspective*, 28 J. LEG. MED. 223, 226 (2007).

16. Rajagopalan, *supra* note 13, at 2. It is important to bear in mind that there is limited data with respect to the actual number of medical tourists and that many figures include the third category of health tourism, or specifically, the non-basic medical care procedures like spa treatments in their computation. See Terry, *supra* note 11, at 424.

17. Rajagopalan, *supra* note 13, at 2. The medical tourism market has already greatly expanded, and between 2001 and 2005, the industry grew at a rate of 20% to 30%. See *Trade in Services & Developing Countries: The Market Access Barriers*, POL’Y BRIEF (CUTS Ctr. for Int’l Trade, Econ. & Env’t, Jaipur, India), May 2005 [hereinafter “CUTS Policy Brief”].

18. See Howze, *supra* note 7, at 1015; Rajagopalan, *supra* note 13, at 2.

types of purification.¹⁹ Throughout the seventeenth and eighteenth centuries, it was not uncommon for Europeans to travel to Germany and across the Nile for various spa treatments.²⁰ And by the twentieth century, patients across the globe began traveling to foreign destinations in pursuit of plastic surgery and more basic medical treatment, and the medical tourism market continues to flourish today.²¹

Contrary to the new, popular understanding of the term, medical tourism is actually a two-way street: nationals of developing countries have long sought medical treatment and cures for diseases in industrialized nations that could not be found in their own countries due to lack of technology and resources.²² For example, foreigners have been traveling to the United States for years to secure first-rate, world-renowned medical care and continue to do so if their budgets permit.²³ However, the latest focus has been on citizens of industrialized nations traveling to less-developed countries to obtain medical services, and more specifically, the concentration has been on U.S. participation in foreign markets.²⁴

B. THE GROWTH OF THE MEDICAL TOURISM MARKET TODAY

Generally, the reasons for the booming emergence and expansion of tourism in the health care market vary. But the most common factor is cost.²⁵ Patients from the United States usually seek medical treatment “at a quarter or sometimes even a tenth of the cost at home.”²⁶ Other patients in the United States simply do not have the insurance necessary to obtain a certain procedure, or their insurance does not cover the procedure they want or need.²⁷ Others simply travel to pursue treatments that are not available in the United States due to lack of Food and Drug Administration (FDA) approval or because the treatment regulated or restricted in some other way.²⁸

The reasons that people from other countries engage in medical tourism differ as well. In certain countries, health tourism offers many patients the opportunity to avoid their home country’s health care rationing

19. Howze, *supra* note 7, at 1015.

20. *Id.* at 1016; *see also* Burkett, *supra* note 15, at 226.

21. Howze, *supra* note 7, at 1016.

22. Rajagopalan, *supra* note 13; Terry, *supra* note 11, at 422-23.

23. Allison Van Dusen, *Outsourcing Your Health*, FORBES, May 2007, http://www.forbes.com/2007/05/21/outsourcing-medical-tourism-bizcx_avd_0522medtourism.html; Terry, *supra* note 11, at 423.

24. *See* Terry, *supra* note 11, at 423; *see also* Michael Klaus, *Outsourcing Vital Operations: What if U.S. Health Care Costs Drive Patients Overseas for Surgery?*, 9 QUINNIPIAC HEALTH L.J. 219, 220 (2006). In addition to the focus on U.S. participation, there has been considerable attention to British and Canadian involvement in the medical tourism market.

25. *See* Howze, *supra* note 7, at 1016-17.

26. *Medical Tourism: Need Surgery, Will Travel*, CBC NEWS, June 18, 2004, <http://www.cbc.ca/news/background/healthcare/medicaltourism.html> [hereinafter “CBC NEWS”].

27. *See* Howze, *supra* note 7, at 1017-18.

28. *See id.* at 1016-17.

systems.²⁹ For example, patients from Canada are typically frustrated by long wait times, and those from Great Britain frequently can neither wait for treatment by the National Health Service nor afford to see a physician in private practice.³⁰ Patients from poorer countries simply might not have the treatment technologically or otherwise available to them at home³¹ and traveling to another nation may mean the difference between life and death.

The convenience of medical tourism travel agents, brokers, intermediaries, and internet concierge services to point medical tourists in the direction of safe and inexpensive resort hospitals has also been instrumental in the growth of the medical tourism market.³² Generally, these service providers “collaborate with airlines, hospitals[,] and hotels to offer medical tourism packages that relieve patients of the burden of arranging airfare, lodging, transportation[,] and a vacation,” create custom deals based on each patient’s budget, medical needs, and country preference, and provide profile information on hospitals and surgeons, including their respective accreditations and qualifications.³³

Many of these companies—especially those that pride themselves on being medical tourism intermediaries—perform the valuable functions of providing critical information and arranging travel-related services.³⁴ Medsolution—a North America-based company—provides these intermediary services through its partnerships with hospitals and acts as an information link between the market in North America and various medical groups in South America.³⁵ The company sets basic criteria for its foreign medical partners, including: “health and safety inspections, clear communication facilities [such as having a medical] staff fluent in English, certification, insurance and credibility, and site inspections.”³⁶

With the growth of the medical tourism industry, there has been a growth in these concierge service providers. In 2006 alone, PlanetHospital—a California-based agency—assisted 500 patients; a number which the founder expects to rise to 5,000 in 2008.³⁷ Similarly, MedRetreat served 250 patients in 2006 and expects that number to quadruple in 2008.³⁸

The destination countries themselves also have internet-based agencies to assist foreign travelers in obtaining surgery and travel packages.

29. Terry, *supra* note 11, at 423.

30. CBC NEWS, *supra* note 26.

31. *Id.*

32. \See Van Dusen, *supra* note 23. Two of the most prominent agencies are PlanetHospital, which is available at <http://www.PlanetHospital.com>, and MedRetreat, which is available at <http://www.MedRetreat.com>.

33. Klaus, *supra* note 24, at 227.

34. See Caballero-Danell & Mugomba, *supra* note 10, at 40.

35. *Id.* at 40-41.

36. *Id.* at 41. Medsolution also has medical partners in the both the Asian and European regions. *Id.* at 40.

37. Van Dusen, *supra* note 23.

38. *Id.*

Plenitas, a provider based in Buenos Aires, Argentina, offers “World-Class Health and Leisure Packages” tailored to Americans, Europeans, and Hispanics that provide various amenities to its patient-clients.³⁹ One such package includes the combination of breast implants (or some other form of cosmetic surgery) and Tango lessons from Argentinean dance instructors.⁴⁰

There are also Internet communities, such as PlasticSurgeryJourneys.com or HealthMedicalTourism.org, that facilitate communication between individuals who have already had surgery or medical treatment abroad and those who are seeking such services.⁴¹ Members of such communities openly discuss their experiences with hospitals and providers abroad, and if patients have a bad experience or receive low-quality services, other members of the website know to avoid such physicians, hospitals, and providers.⁴²

In addition, the efforts of employers to cut costs by moving towards foreign vacation packages as part of group health insurance plans has drawn attention to the industry and allowed for some who might not otherwise have been able to obtain a procedure to engage in medical tourism at an even lower cost.⁴³ Certain employers already utilize plans providing for overseas or across-the-border options in health care while other employers are looking to provide such plans in the future.⁴⁴ Blue Shield of California’s Access Baja Plan is one example of such an arrangement and provides for reimbursement for individuals who live near the border and undergo medical treatment in Mexico.⁴⁵

C. THE EXPANSION OF MEDICAL TOURISM IN LATIN AMERICA

As mentioned above, in 2005, an estimated 500,000 Americans traveled abroad for medical treatment, and the majority of those Americans traveled to Mexico and other Latin American countries.⁴⁶ The destinations of choice for many medical tourists in general in recent years have been India and Thailand, and those countries are often considered the market leaders.⁴⁷ However, many Latin American countries are quickly making their mark in the field—especially with consumers from the United States—and these countries have the potential to grow an even stronger

39. Caballero-Danell & Mugomba, *supra* note 10, at 39.

40. *Id.*

41. Devon M. Herrick, *Medical Tourism: Global Competition in Health Care* 17 (2007) available at <http://www.ncpa.org/pub/st/st304/st304.pdf>.

42. *Id.* Patients who were disfigured by plastic surgeons in Mexico created a website devoted to warning others seeking such procedures to avoid places deemed to be performing poor quality work. *Id.* (discussing <http://www.cirujanoplasticos.info>).

43. Bye, *supra* note 4, at 30.

44. See Michele Masucci & Scott Simpson, *Outsourcing Care: Medical Tourism is the Globalization of the American Operating Room*, 238 N.Y.L.J. 11 (2007).

45. *Id.*

46. Herrick, *supra* note 41, at i.

47. See Masucci & Simpson, *supra* note 44.

presence in the future.⁴⁸

Brazil, Argentina, Costa Rica, and Columbia have been some of the front-runners in medical tourism in Latin America and have long offered lower-cost plastic surgery.⁴⁹ The estimate number of foreigners using Brazilian health facilities every year is 45,170⁵⁰ and at least 10,000 individuals travel to Mexican clinics each year as well.⁵¹ Although patients might have to pay more for particular procedures in Latin America than they would in India or Thailand, certain procedures are less expensive and the location is more convenient as the plane ride is half as long.⁵²

Further, while Latin America has been a medical tourism destination for individuals seeking cosmetic or plastic surgery for years, individuals are now turning to these nations for “more serious” medical procedures.⁵³ Latin American countries are increasingly attempting to gain respect in the market, and places such as Columbia are continuing to work hard to attract medical tourists.⁵⁴ In 2002, the Bogota authorities spent a considerable amount of resources on launching the Capital Health Project in an effort to convince people that “despite the city’s reputation for violence, visiting the Colombian capital can actually be good for their health.”⁵⁵ In addition, Brazil and Argentina are working hard to provide more advanced medical treatments to their foreign patients and are becoming more prominent in the industry.⁵⁶ Chile, Cuba, and Peru also actively promote medical tourism in their countries and have recently been emerging as important players in the industry.⁵⁷

Foreign visitors traveling to Cuba for treatment in specialist hospitals and medical facilities generate approximately \$40 million in annual revenue for the Cuban economy.⁵⁸ While most of these medical tourists travel to Cuba from Latin America, “some unique Cuban treatments, such as that for night blindness, also attract clientele from developed countries in Europe and North America.”⁵⁹ Cuba’s premier health services industry is ever growing as it develops further advanced and specialized treatments that cannot be found in many other places.⁶⁰

Mexico is also developing a strong presence in the industry, mostly by

48. See generally Wolff, *supra* note 1.

49. Herrick, *supra* note 41, at 4-5.

50. See Wolff, *supra* note 1.

51. Burkett, *supra* note 15, at 227.

52. See generally Herrick, *supra* note 41, at 8-9; Wolff, *supra* note 1, at 2.

53. See Bye, *supra* note 4, at 30.

54. Owain Johnson, *Bogota Launches Health Tourism Project*, BRIT. MED. J., <http://www.bmj.com/cgi/content/full/325/7354/10/e>.

55. *Id.*

56. Herrick, *supra* note 41, at 4-5.

57. See CUTS Policy Brief, *supra* note 17. Likewise, Bolivia actively promotes medical tourism but its promotion seems to be on a smaller scale than the other Latin American countries. See Caballero-Danell & Mugomba, *supra* note 10, at 4.

58. Daniel P. Erikson, *The Future of American Business in Cuba: Realities, Risks, and Rewards*, 14 TRANSNAT’L L. & CONTEMP. PROBS. 691, 703-04 (2004).

59. *Id.* at 704.

60. See Caballero-Danell & Mugomba, *supra* note 10, at 20.

its offering of inexpensive dentistry.⁶¹ It is also “one of the fastest-growing markets in the world” for medical tourists seeking plastic surgery.⁶² Mexico is a convenient choice for Americans living near the border, and the prices for prescription drugs, physician care, and dental services are, on average, at least 40 percent cheaper than they are in the United States.⁶³ The country’s presence is likely to become even more substantial in the future as several companies are beginning to build and operate hospitals there that meet U.S. standards and that are geared towards providing convenient care for Americans.⁶⁴ One such example is Dallas-based International Hospital Corp., which currently operates four Mexican hospitals (and even more in Brazil and Costa Rica).⁶⁵

Costa Rica and Panama are also popular health tourism destinations. While Costa Rica is best known for offering quality dental work at a fraction of U.S. prices (usually one-half to one-third the cost), its medical treatment offerings are vastly expanding.⁶⁶ In 2006, an estimated 150,000 foreigners sought medical care in the country, and the numbers are expected to grow in the near future.⁶⁷ In addition, Panama offers high-quality medical care at 40 to 70 percent less than the cost in the United States, and many of the physicians are U.S. trained.⁶⁸

These Latin American countries offer the potential for substantial cost-savings for patients seeking medical treatment and provide a more convenient location than those countries that are situated on the other side of the world. And as Latin America gains more respect for the services they offer, it is likely that even more Americans will opt for treatment in the region.

III. ADVANTAGES AND BENEFITS OF TRAVELING ABROAD FOR MEDICAL CARE

There are many advantages and benefits to pursuing medical treatment abroad. Medical tourism allows for overall patient access and political flexibility, high medical staff to patient ratios, and the availability of procedures not approved by the FDA or not offered in the United States, such as experimental therapy.⁶⁹ It is also a viable option for underinsured or noninsured Americans who do not have access to or simply do not want to use state, federal, or charitable programs or personal contri-

61. Terry, *supra* note 11, at 425.

62. Sara Miller Llana, *Plastic Surgery “Vacations” in Mexico*, MED. TOURISM UPDATE (Int’l Soc’y of Aesthetic Plastic Surgery, Hanover, N.H.), Sept.-Nov. 2007, at 14, available at http://www.isaps.org/uploads/news_pdf/isaps_newsletter_sept_nov_07_b.pdf.

63. Herrick, *supra* note 41, at 3.

64. *Id.* at 3.

65. *Id.* at 3.

66. *Id.* at 4, 6.

67. *See id.* at 6.

68. *Id.*

69. *See* Burkett, *supra* note 15, at 237-38.

butions.⁷⁰ In addition, patients typically enjoy amenities not available in the average U.S. hospital, such as luxurious patient suites and high staff-to-patient ratios with nurses being available at all hours.⁷¹ Unlike most general hospitals in the United States, these foreign counterparts often resemble five-star hotels,⁷² thus making the patient feel comfortable and at ease.

Moreover, the cost savings are extremely persuasive and probably provide the greatest advantage for most patients. Some examples of savings are highlighted above. Other examples include: a heart bypass surgery costs \$113,000 in the United States, but only \$3,250 in Mexico;⁷³ a complete hip replacement in the United States costs \$47,000, compared with only \$17,300 in Mexico;⁷⁴ and a partial hip replacement results in savings of up to \$12,000 when the procedure is done in Argentina rather than the United States.⁷⁵ Non-surgical procedures are also much cheaper, and an MRI that costs over \$1,000 in the United States costs just \$200-\$300 in Mexico, Brazil, or Costa Rica.⁷⁶ With some savings being up to 90 percent, it's no wonder that many are allured. And when these patients consider that their post-op vacation package with sun, sand, beaches, and massages still does not come near the price of the surgery alone in the United States,⁷⁷ they are even more induced to obtain the procedure abroad.

But while the cost savings allure many, the lower cost may mean the difference between life and death for those who are uninsured or underinsured. Approximately 35 to 40 million Americans are either underinsured or do not have sufficient coverage addressing the reality of their needs, and others with good coverage are denied treatment that is not considered "medically necessary."⁷⁸ In fact, research from the Institute of Medicine reveals that more than 18,000 U.S. citizens die each year because they do not have medical insurance.⁷⁹

Another bonus is that medical tourism has the potential to reduce U.S. health care costs in the long run due to increased competition.⁸⁰ One

70. *Id.* at 237.

71. Masucci & Simpson, *supra* note 44.

72. Caballero-Danell & Mugomba, *supra* note 10, at 26.

73. Wolff, *supra* note 1.

74. *Id.*

75. *See* Herrick, *supra* note 41, at 8.

76. *Id.*

77. *See generally* Caballero-Danell & Mugomba, *supra* note 10, at 39. An estimated 80% of the high cost of health care in the United States is attributable to bureaucracy, paperwork, and medical malpractice insurance. Latin American countries that provide inexpensive medical care, however, use most of the fees they receive for paying the people actually involved in the medical care. *See* Winston Awadzi & Dandeson Panda, *Medical Tourism: Globalization and the Marketing of Medical Services*, 11 CONSORTIUM J. 75, 78 (2006), available at http://www.hbcuhospitality.com/Consortium11-1_006.pdf#page=75.

78. Wolff, *supra* note 1, at 2.

79. *Id.*

80. *See* Van Dusen, *supra* note 23. One recent study found that an estimated \$1.4 billion could be saved each year in the United States if just ten U.S. patients went

U.S. medical center has already begun to make changes in an effort to keep up with foreign competitors: Rapid City, a South Dakota-based surgery center, plans on offering knee and hip replacements for under \$20,000 each, less than half of what it costs elsewhere in the United States, in order to compete with the growing medical tourism market and draw more patients to their facility.⁸¹ Likewise, this increased competition (along with the globalization of health care) will result in the raising of the quality of medical care received.⁸²

There is also evidence that the quality of care is not sacrificed when an individual chooses to travel abroad for medical service, even if the medical service is obtained in what many would consider a third-world country.⁸³ While there is no international regulatory standard of care, the Joint Commission International (JCI) (the international counterpart to the Joint Commission Accreditation for Hospital Organizations—an independent entity that certifies American hospitals) sends its review board to foreign hospitals to determine whether that hospital is deserving of accreditation.⁸⁴ The board is sent to hospitals where there are lengthy waiting lists and uses the same rigorous accreditation standards that U.S. hospitals strive for.⁸⁵ In order for a hospital to maintain accreditation, it must consent to such an on-site survey or evaluation every three years.⁸⁶

To date, JCI has accredited more than 120 hospitals in twenty-three countries and continues to serve as a guide to those seeking medical treatment abroad.⁸⁷ In Latin America, Brazil currently leads in number of accredited hospitals with fifteen.⁸⁸ Other countries sometimes choose to adopt their own accreditation standards, and many foreign hospitals “are owned, managed, or affiliated with prestigious American Universities or health care systems.”⁸⁹ For example, Hospital Punta Pacifica in Panama City, Panama is affiliated with John Hopkins Medicine International, a U.S.-based institution devoted to medical education and research.⁹⁰

abroad for a limited number of low-risk medical treatments. Jutamas Arunachai & Carsten Fink, *Trade in Health Services in the ASEAN Region* 20 (World Bank Pol’y Research, Working Paper No. 4147, 2007) available at http://www-wds.worldbank.org/servlet/WDSContentServer/IW3P/IB/2007/02/22/000016406_20070222101041/Rendered/PDF/wps4147.pdf.

81. Van Dusen, *supra* note 23.

82. Herrick, *supra* note 41, at 26.

83. *See generally* Burkett, *supra* note 15, at 230.

84. *Id.* at 230-31.

85. *Id.*

86. Klaus, *supra* note 24, at 234-35.

87. Masucci & Simpson, *supra* note 44.

88. Joint Commission International, List of Accredited Organizations, <http://www.jointcommissioninternational.org/JCI-Accredited-Organizations> (last visited Dec. 26, 2008).

89. Herrick, *supra* note 41, at 16.

90. *See* Herrick, *supra* note 41, at 16; *see also* John Hopkins Medicine International, CASE STUDIES AND AFFILIATIONS, <http://www.jhintl.net/glo/projects/> (follow “Hospital Punta Pacifica” link) (last visited Dec. 26, 2008). Clinica las Condes in Santiago, Chile and the Instituto Tecnológico de Estudios Superiores de Monter-

Further, many of the physicians in foreign hospitals have a particular draw for Americans seeking medical treatment overseas or across the border because they were medically trained in the United States.⁹¹ Most other physicians working in the medical tourism industry received quality training in Canada, Australia, or Europe.⁹² In addition, the medical staff members usually have U.S. board certification or some other sort of internationally esteemed credentials, or are specifically certified by some other board in their field of specialization.⁹³

These positives have already led millions to select medical treatment in Latin America and other foreign regions. But despite all of these advantages and benefits, there are also downfalls in the medical tourism market worthy of consideration.

IV. DISADVANTAGES AND CRITIQUES OF MEDICAL TOURISM

While the medical tourism market is steadily continuing to grow and many patients are reaping advantages from the market, it is not without criticism. The World Health Organization has explained that in the last five years:

although there was a great opportunity for the growth of medical tourism by both developing and developed countries, the main barriers developing countries faced were: the negatively perceived quality of health professionals available and standards of quality assurance in health care facilities; mutual recognition of professional credentials; non-portability of insurance coverage; lack of standards for electronic medical records; concerns about patient privacy and confidentiality in distance health care delivery; and difficulties in cross jurisdictional malpractice liability⁹⁴

The first thing to remember is that traveling to a foreign nation can be stressful enough when undertaken solely for the purpose of vacation or pleasure. Traveling in order to obtain a critical or even routine surgery simply adds to that stress.

Second, many claim that the practice is simply unsafe and question the credentialing of doctors and hospitals and the availability of proper monitoring techniques.⁹⁵ Currently, there is no database for complaints (with the closest thing being the Internet communities mentioned above) and there is no central or universal system of licensing for the doctors or the intermediaries who send them patients.⁹⁶ This causes many to question

rey, more commonly known as Tec de Monterrey, in Monterrey, Mexico are also affiliated with John Hopkins Medicine International.

91. *Id.*

92. Herrick, *supra* note 41, at 17.

93. See *id.*

94. Caballero-Danell & Mugomba, *supra* note 10, at 37-38 (explaining the WHO's stance based on one of the organization's working papers).

95. Howze, *supra* note 7, at 1026.

96. Awadzi & Panda, *supra* note 77, at 79.

the credentialing and qualifications of the staff and the safety of obtaining procedures under these circumstances.

But the fact is that little evidence exists to support the idea that botched operations are a common problem encountered by medical tourists.⁹⁷ When complications do arise, surrounding factors usually play a large role. In the average situation, there is typically little follow-up care, with complications and post-operative care being the responsibility of the health care system in the patient's home country.⁹⁸ In addition, complications can arise with inappropriate post-surgical sight-seeing or extended traveling.⁹⁹ For example, if the patient boards a lengthy flight after surgery, he or she has a much higher chance of developing pulmonary embolism, a lethal condition that occurs when a blood clot travels from somewhere in the body to the lungs and blocks an artery.¹⁰⁰

Sometimes complications arise because patients go against medical advice and attempt to have too many surgeries during the same trip, usually in an effort to minimize their time away and save in travel costs.¹⁰¹ These "patients may be enticed by package-deals (which are especially prevalent in Latin America), such as those combining "full-body liposuction, breast implants or lift, and a tummy tuck" for prices "as low as \$6,500."¹⁰² While this figure does not include your travel and lodging, these costs may be minimal and the patient is usually comparing the cost to the \$12,000 to \$30,000 range of such a combination of surgeries in the United States.¹⁰³ The downfalls and concerns arise after the package of surgeries is performed and patients experience slow, painful recoveries and require additional post-operative monitoring.¹⁰⁴

Tied to safety is the issue of unpredictability. Some U.S. physicians claim that while the best hospital in some of these countries is on par with the best hospital in the United States, the problem arises when the average hospital in that country is compared with the average hospital in the United States—it is then that you find an "enormous discrepancy."¹⁰⁵ There are, in fact, cases where patients return to their home country "with disfigurement and nearly fatal infections [that may be] associated with unaccredited hospitals and unlicensed providers."¹⁰⁶ The counter-

97. Herrick, *supra* note 41, at 17.

98. CBC News, *supra* note 26.

99. Howze, *supra* note 7, at 1026

100. *Id.* at 1028-29. The main causes of pulmonary embolism are (1) undergoing surgery and (2) long periods of inactivity; thus, a long flight after surgery greatly increases the risk of developing the condition. Because a shorter flight decreases such risk, Latin American destinations become more desirable than trans-Atlantic locations for many individuals. Many doctors actually advise their patients to pay the extra money for a Latin-American surgery in order to lessen this risk. *See id.*

101. Herrick, *supra* note 41, at 18.

102. *Id.*

103. *Id.*

104. *Id.*

105. Wolff, *supra* note 1, at 3.

106. Terry, *supra* note 11, at 464 (quoting the President of the American Society of Plastic Surgeons).

argument of course is that things can go wrong in any country and in any hospital, even those in the United States,¹⁰⁷ for a variety of reasons.¹⁰⁸ Further, many would not go to an average hospital in a foreign country to get a procedure done; instead, they would go to a medical concierge service to find the best quality place for the most affordable price.¹⁰⁹ The fact is that there is simply not enough data to address the issues of quality of care, safety, and unpredictability, and “[f]or every story about the risks of medical tourism there are countervailing endorsements from satisfied patients” or observations that many surgery centers abroad are at least equivalent to those in the United States.¹¹⁰

Even if things overseas go great, however, circumstances might change once you are home. For example, it might be difficult for medical tourists to find a doctor that is willing to give them post-operative care after a foreign medical procedure, and even if a patient’s medical concierge service finds them a doctor, lack of immediacy of follow-up care may cost the patient months more in recovery time.¹¹¹ This undesirability of doctors to provide post-operative care for medical tourists is not universal, but where it exists, it mainly stems from the physician’s perceived risk of incurring liability for a foreign doctor’s mistake and from the typical medical tourist’s lack of insurance (which causes physicians to believe that they will not be paid).¹¹²

Further, governmental safeguards ensuring quality of care are generally lacking, with the closest thing being accreditation by the JCI, which causes many people to question the quality of care received abroad.¹¹³ The level of standardization that exists in the United States does not exist in the rest of the world, and there is currently not a sufficient system in place to guide people through determining where good medical care exists.¹¹⁴ So far, the JCI has a limited reach: “foreign hospitals are not required to apply and many do not,” although not necessarily because they are worried of being found to be substandard—the process is simply not appealing enough to some because it takes roughly eighteen to twenty-four months and costs about \$30,000 to complete.¹¹⁵ Thus, even though it is meaningful, lack of JCI accreditation may not be a real problem. Additionally, some experts question the quality of the JCI reviews by saying

107. Medical error is one of the leading causes of death in the United States, and in 2004, it was estimated that approximately 195,000 people die each year due to medical error alone. *See generally In Hospital Deaths from Medical Errors at 195,000 per Year USA*, MED. NEWS TODAY, Aug. 9, 2004, <http://www.medicalnewstoday.com/articles/11856.php>.

108. *See generally* Bye, *supra* note 4, at 31.

109. *See* Burkett, *supra* note 15, at 229.

110. Terry, *supra* note 11, at 464.

111. Wolff, *supra* note 1, at 4.

112. Herrick, *supra* note 41, at 25. This is less of an issue with patients who have regular doctors. In that case, the medical tourists’ regular doctors usually do not mind treating their patients throughout the recovery process. *Id.* at 26.

113. Burkett, *supra* note 15, at 233-34.

114. Wolff, *supra* note 1, at 3.

115. *Id.*

that it is just too difficult to assess “medical training and ongoing quality of care outside of the United States.”¹¹⁶

There is also the issue of selecting a physician that possesses adequate credentials or qualifications in the field that he or she says they do.¹¹⁷ Most of the countries offering cheaper medical care have “weak malpractice laws [(not to mention unfamiliar legal systems)], [leaving] the patient [with] little recourse [in the event that something] does go wrong,” an issue discussed in more detail in Part V.¹¹⁸

Another criticism is that there are important social costs in the destination countries as a result of opening their doors to foreign patients.¹¹⁹ The general proposition is that when hospitals in destination countries begin marketing themselves to foreign patients, the amount of access of the local population to those services is limited, thereby taking away medical resources and personnel from much of the destination country’s local population.¹²⁰ This type of effect can already be seen in Cuba, which has reaped economic gains by becoming “specialized in the field of therapies for diseases that are hard or impossible to cure in other parts of the world.”¹²¹ These benefits are often not seen by Cuban patients, however, as Cuba has special hospitals and separate floors or wings for foreign patients—and these are the places that offer and provide the quality modern care—while most of the public health care system is deprived of adequate funding.¹²² This “hierarchical system” where hospitals elect to treat foreigners over the local population stems from Cuba’s desire to acquire strong currencies, causing most Cubans themselves to become a distant second priority to foreigners from industrialized nations who seek to obtain these advanced medical treatments.¹²³

Finally, medical tourism does not eliminate the problem of access to medical care, and many individuals still may not be able to obtain these types of health care services because they cannot take time away from work or otherwise cannot afford the treatments. For instance, the patient usually has to pay cash because many of these procedures are not covered by the U.S. government or medical insurance plans, thus leaving many individuals without the option and without additional recourse.¹²⁴

116. *Id.*

117. Masucci & Simpson, *supra* note 44.

118. CBC News, *supra* note 26.

119. Burkett, *supra* note 15, at 232-33.

120. *Id.*

121. Caballero-Danell & Mugomba, *supra* note 10, at 20.

122. *Id.*; see also *Health Care in Cuba: Myth Versus Reality—Cuba’s Economic Choice: The Regime’s Health Over the People’s*, CUBA ISSUE BRIEFS (Cuban American Nat’l Found., Miami, FL.), <http://canf.org/Issues/medicalapartheid.htm>. [hereinafter “Cuban American Nat’l Found. Issue Brief”]. Because these special hospitals usually house foreign patients who pay cash, Cuban doctors are likely to make more money in the foreign hospitals and are thus pulled away from helping the local population.

123. Caballero-Danell & Mugomba, *supra* note 10, at 20; see generally Cuban American Nat’l Found. Issue Brief, *supra* note 122.

124. CBC News, *supra* note 26.

These criticisms have caused some individuals to question whether they would be comfortable with obtaining medical services abroad. Nevertheless, medical tourism continues to grow, and for many individuals, there would otherwise be no hope for treatment.

V. POLITICAL AND LEGAL IMPLICATION AND CHALLENGES IN THE MARKET

There are several political and legal implications and challenges that are already or are likely to be involved with the growing medical tourism market. The most obvious legal concern is the issue of liability when medical malpractice or negligence occurs.¹²⁵ Other issues arise over insurance coverage or non-coverage for medical treatments obtained abroad, and many question whether a national or international regulatory scheme should be implemented to serve as a guide for patients, intermediaries, doctors, and hospitals.

A. LEGAL REDRESS WHEN THINGS GO WRONG

Currently, there are no international governing regulations or set of best practices for medical tourism; so legal recourse is an undefined issue.¹²⁶ Thus, every medical procedure obtained abroad has a built-in element of risk.¹²⁷ Bear in mind that this risk is already present whenever patients undergo surgery, even routine surgery in their own country, but the idea of having no legal recourse when things go wrong only exacerbates the problem. If a patient from the United States experiences a botched surgery abroad and attempts to obtain legal redress from the doctor and/or hospital, problems will arise no matter where the patient decides to sue—in the foreign country or in the United States.¹²⁸

1. *Lawsuits in the United States*

If a patient wants to sue the foreign doctor in the United States, he or she must establish personal jurisdiction over the doctor, a legal requirement that is likely to prove problematic.¹²⁹ An analysis of personal juris-

125. A different set of legal issues arise when patients travel to foreign destinations with universal health care plans with the idea that the foreign nation will fund his or her health care needs. The U.K. government has developed a website devoted to this issue and has recently tightened its criteria for patients to receive free care. Terry, *supra* note 11, at 427. The first case of this area of medical tourism was prosecuted by the National Health Service Counter Fraud Service but was settled when the businessman who traveled to London to obtain the “free” treatment agreed to pay for it. This probably would not be much of an issue for Latin American countries, however, because most countries in the region provide inexpensive private care but lesser-quality care to those who use their public health care facilities. *See id.*

126. Caballero-Danell & Mugomba, *supra* note 10, at 22.

127. *Id.*; see also Philip Mirrer-Singer, *Medical Malpractice Overseas: The Legal Uncertainty Surrounding Medical Tourism*, 70 LAW & CONTEMP. PROBS. 211, 212 (2007).

128. See Howze, *supra* note 7, at 1030-31.

129. Mirrer-Singer, *supra* note 127, at 213.

diction usually involves an examination of the respective state's long-arm statute and an inquiry into whether the foreign doctor has sufficient minimum contacts with the state he or she is being sued in.¹³⁰ This could prove extremely difficult, especially if the doctor never entered the forum state, and courts have traditionally found that "nonresident physicians do not intend for their services to have an impact beyond the state in which they practice" and are "generally reluctant to assert jurisdiction over physicians who neither reside nor practice in the state where the court sits (in the forum state)."¹³¹ Even if the doctor is found to have sufficient contacts within the state, the exercise of jurisdiction over that individual must nevertheless be reasonable, and the foreign destination cannot be viewed as a viable alternative for obtaining a remedy—otherwise, the patient will not be able to sue in the U.S. court.¹³²

Further, even assuming the U.S. court does extend jurisdiction over the foreign doctor, there are additional issues of considering forum non conveniens dismissal and deciding which law to follow—that of the United States or that of the foreign jurisdiction.¹³³ On top of that, even if the patient is able to sue in the U.S. court and wins, he or she would still face enforceability issues because enforcement would have to occur in the foreign jurisdiction.¹³⁴

There might be an option of holding the medical tourism firm that pointed you in the negligent doctor's direction accountable under U.S. agency law or some other similar theory, but those theories have not been tested and would also likely prove difficult.¹³⁵ For example, many of the medical tourism agencies require medical tourists to sign agreements recognizing the foreign providers' independence from the agency itself, making a vicarious liability claim extremely challenging.¹³⁶ There would also be proximate-cause concerns and issues related to the agency's actual representations and their materiality to the claim, making it hard to prove any negligence or consent theories.¹³⁷ The future possibility of such claims is discussed in more detail in Part VI, but as of now, such claims are unlikely. Thus, redress under the U.S. court system under either a medical malpractice claim against the doctor and/or hospital or under

130. Howze, *supra* note 7, at 1031.

131. Mirrer-Singer, *supra* note 127, at 213.

132. Howze, *supra* note 7, at 1032. While there are a whole host of issues, inquiries, and factors to consider in a discussion of whether U.S. law would grant jurisdiction over a foreign doctor, the pertinent U.S. law is beyond the scope of this paper.

133. Masucci & Simpson, *supra* note 44; *see also* Howze, *supra* note 7, at 1037.

134. Howze, *supra* note 7, at 1038.

135. Mirrer-Singer, *supra* note 127, at 216. Various legal theories that might be used in attempting to hold the medical tourism agency liable include: "corporate negligence, the informed consent doctrine, and vicarious liability." *Id.* None of these options have been tested in the medical tourism arena, however, and none of them fit perfectly into such a context. *Id.* at 216-21 (discussing these legal theories in greater detail).

136. *Id.* at 221.

137. *Id.* at 217, 219.

some sort of agency theory against the medical tourism agency would be reaped with difficulty and would unlikely result in liability.

2. *Lawsuits in Latin American/Foreign Court Systems*

If the patient chooses to sue the foreign doctor in a foreign court system for medical malpractice, the legal action could be even more difficult. Just some of the problems a patient might encounter include are differing and unfamiliar laws, language barriers when the court systems operate in the local language, low settlements when compared with traditional American standards, and high costs and difficulty in finding an attorney.¹³⁸

Additionally, other countries are not as litigious as the United States so physicians in many foreign countries do not feel the threat of litigation.¹³⁹ For example, in Brazil, which is probably the most popular Latin American medical tourism destination, malpractice laws result in less accountability for doctors.¹⁴⁰ Brazilian doctors are rarely held civilly liable for malpractice because few cases are brought.¹⁴¹ And those that are brought rarely obtain a judgment due to uncertainties surrounding the burden of proof, obstacles in obtaining evidence, and excessively lengthy trials (many lasting upwards of ten years).¹⁴²

The Cuban legal system even further limits lawsuits by patients against doctors.¹⁴³ Cuban patients themselves “cannot sue doctors because such a lawsuit would be against the government;”¹⁴⁴ so it is even less likely that a foreign patient would be able to impose liability. In addition, while a doctor may be fired or reprimanded from the medical institution for their actions, no monetary compensation is available to the patient-victim in Cuba.¹⁴⁵

Because negligence and medical malpractice lawsuits are supposed to deter unsafe practices and careless operations by surgeons, the absence of the threat of litigation could provide less incentive for foreign practitioners to be safe while treating or performing operations on their patients.¹⁴⁶ On the other hand, there is currently little evidence that the U.S. malpractice system actually effectively deters medical negligence when compared with those countries that either do not have malpractice laws or do

138. Wolff, *supra* note 1, at 5.

139. *Id.* Hospitals and doctors in foreign nations do not have to pay as much for malpractice insurance, which is one reason experts point to in explaining why surgery abroad is so much cheaper. *Id.*

140. Kate Duncan Kostrzewa, *The “Ought,” the “Is” and Reproductive Reality: A Case Study of the Law and Contraceptive Practice in Brazil*, at 157-58 (Aug. 2003) (unpublished Ph.D. dissertation, The University of Texas at Austin), available at <https://www.lib.utexas.edu/etd/d/2003/kostrzewakdO36/kostrzewakdO36.pdf>.

141. *Id.* at 158.

142. *Id.*

143. Javier H. Campos, M.D., *The Impact on the U.S. Embargo on Health Care in Cuba: A Clinician’s Perspective*, 14 TRANSNAT’L L. & CONTEMP. PROBS. 517, 526 (2004).

144. *Id.*

145. *Id.*

146. Klaus, *supra* note 24, at 236.

not rigorously enforce them.¹⁴⁷ And in many foreign countries the risk of losing patients might be sufficient enough to deter any unsafe practices.¹⁴⁸ With the likely absence of legal redress in the event of substandard health care, one thing is becoming increasingly clear—if negligence does occur and the patient is harmed abroad, he or she is likely to bear the full cost of the medical error.

B. INSURANCE COVERAGE FOR MEDICAL PROCEDURES OBTAINED ABROAD

Another dilemma involves adding tourism coverage to existing medical insurance policies. While many commentators argue that the U.S. health care bill “could be reduced by up to \$2 billion per annum if policies provided a tourism option that included travel expenses,” such coverage is generally not included because of the “indeterminacies associated with quality and liability exposure, monitoring costs associated with distant providers, and possible oligopolistic behavior by insurers.”¹⁴⁹

Some insurance carriers have already set in motion policies that provide coverage for medical services obtained abroad. In 2005, nearly 40,000 people enrolled in the Access Baja plan described above.¹⁵⁰ These individuals signed up for health care coverage for services obtained in Mexico and enjoyed low premiums (sometimes less than two-thirds the cost of other carriers) due to the lower cost of procedures in Mexico.¹⁵¹

Because some insurance policies have already begun including internationally-obtained procedures in attempts to cut costs, in the future, many insurance companies and policymakers “will [be able to] use the threat of overseas” or across-the-border satisfaction as a “powerful bargaining tool with domestic health care providers.”¹⁵² One such success story involves a contract between the Amish and Mennonite communities and the Lancaster Regional Center in Pennsylvania: the communities successfully negotiated “discounted flat-rate payments” for certain medical services in exchange for a pledge against malpractice claims and the reception of cash payments.¹⁵³ The contract was for a limited number of procedures and the negotiations were based on the parties’ experiences with discounted rates from their regular travel to Mexico for health care services.¹⁵⁴

When employers begin providing coverage for medical care obtained abroad and offering strong incentives to their employees if they select such an option, issues of liability are once again likely to arise. In the United States, sponsors of such plans must be able to meet the fiduciary

147. *Id.*

148. *Id.*

149. Terry, *supra* note 11, at 462.

150. Herrick, *supra* note 41, at 21.

151. *Id.*

152. Terry, *supra* note 11, at 462.

153. *Id.* at 462-63.

154. *Id.*

standards imposed by the Employee Retirement Income Security Act (ERISA), and employers who offer financial benefits for employees who elect international care might face greater liability.¹⁵⁵ On the one hand, there is a concern that such financial incentives might induce individuals to accept the possibility of substandard care when they otherwise would have elected to have the procedure performed at a local hospital.¹⁵⁶ On the other hand, many plans already induce their enrollees to accept care at a particular hospital in the insurer's network, and if there were no incentives or benefits provided to patients who opt to travel abroad, most would be unlikely to do so.¹⁵⁷ Thus, it is unclear whether courts would impose such liability if the question arose.

Because insurance coverage has the potential to downplay malpractice problems, national and state governments should begin setting an example for insurance carriers to offer coverage for medical services obtained abroad. Some legislators in the United States have already attempted to do just that. One West Virginia delegate has proposed a bill that would provide state employees and their families with coverage for medical care obtained abroad and third-party insurance offering compensatory damages in the event that the patient is disfigured.¹⁵⁸ The pending legislation would also allow for the patient and his or her companion to be reimbursed for first-class airfare and a four-star hotel, and would provide bonuses and additional sick leave if the option is selected—an option that has the potential to save the state up to two million dollars annually in health care costs.¹⁵⁹ While this proposal would likely face the same challenges as the insurance plans mentioned above, it could be a good attempt at setting an example that embraces the cheaper costs of medical services offered in many quality foreign institutions.

C. CURRENTLY THERE IS NO FORMAL REGULATION OF THE MEDICAL TOURISM INDUSTRY

Because formal regulation of the medical tourism industry is lacking, there is a need to establish some sort of guiding principles, especially considering the likely absence of legal recourse mentioned above. The U.S. government is increasingly becoming involved in the debate, and the regulatory scheme issue implicates many political issues for those legislators. While no steps have been taken to actively regulate or restrict the industry, some politicians have attempted to pass legislation either allowing for or affecting American involvement in the industry.¹⁶⁰ For instance, Sena-

155. Herrick, *supra* note 41, at 26

156. *Id.*

157. *Id.*

158. See Masucci & Simpson, *supra* note 44.

159. See *Businesses, Insurance Companies Promote Medical Tourism to Reduce Costs*, Nov. 7 2006, <http://www.medicalnewstoday.com/articles/55907.php>.

160. See generally Press Release, U.S. Senate Spec. Comm. on Aging, Smith Calls for Task Force to Review Medical Tourism (July 11, 2006) available at <http://aging.senate.gov/minority/index.cfm?FuseAction=press->

tor Gordon Smith of the Senate Special Committee on Aging has enlisted the assistance of the Departments of Health and Human Services, Commerce, and Homeland Security to build a medical tourism task force designed to study the effects of the globalization of health care.¹⁶¹ The task force will specifically focus on issues related to patient safety and will address the economic concerns associated with foreign travel for health care.¹⁶² While restricting the right to travel for medical reasons would likely be against public policy,¹⁶³ attempts to regulate that adhere to a more "best-practices" approach are becoming increasingly necessary (especially considering that the practice leaves open so many questions of responsibility for all parties involved).¹⁶⁴

The international regulation of goods and services is traditionally a function of the World Trade Organization (WTO).¹⁶⁵ The WTO's General Agreement on Trade in Services (GATS) somewhat addresses the issue of medical tourism under its second mode of supply, "consumption abroad."¹⁶⁶ Brazil and Cuba have used this mode to liberalize their health services, but the framework agreement does nothing to actively regulate the industry.¹⁶⁷

The international community has recognized that health care is a "fundamental human right," and the United Nations has passed a treaty dealing with the issue.¹⁶⁸ The International Covenant of Economic, Social, and Cultural Rights was signed by the United States and contains a comment expressing that any state becoming a party to the covenant recognizes that the right to primary health care is a basic obligation of that state.¹⁶⁹ Thus, it is clear that any regulation or set of best practices addressing medical tourism on a national scale should not be protectionist, and further, that those on either national, regional, or international levels

Releases.Detail&PressRelease_id=545&Month=7&Year=2006 [hereinafter *Special Committee on Aging Press Release*].

161. *Id.* The hearings held by the U.S. Senate's Special Committee on Aging in June 2006 involved testimony from a family member of a medical tourist, an employer, an insurer, a tourism intermediary, and a U.S. plastic surgeon and substantially concentrated on the costs of domestic care. Terry, *supra* note 11, at 462.

162. Special Committee on Aging Press Release, *supra* note 160.

163. See Burkett, *supra* note 15, at 241-42 (explaining that there is no fundamental right to health care in the United States).

164. See Burkett, *supra* note 15, at 241.

165. Caballero-Danell & Mugomba, *supra* note 10, at 22.

166. *Id.*

167. RONALD LABONTE ET AL., *Privatization, Liberalization and GATS*, in FATAL INDIFFERENCE: THE G8, AFRICA, AND GLOBAL HEALTH (2004), available at http://books.google.com/books?id=IDMRwKa5KCEC&pg=pa66&lpg=pa66&dq=privatization,+Liberalization+and+GATS+labonte&source=bl&ots=tf3sg26myG&sig=ybqGrNahaf7RXeGzt0FAh0B4uBA&hl=en&sa=X&oi=book_result&resnum=1&ct=result#PPA66.M1. At least fifty-four WTO members have "made commitments to liberalize medical and dental services." *Id.* For many, however, there is an increased concern that GATS will lead to the increased privatization of health care services, an essential public service. *Id.*

168. Burkett, *supra* note 15, at 241.

169. *Id.*

should not restrict the rights of individuals to travel abroad for medical care.

VI. THE FUTURE OF MEDICAL TOURISM

While like many things, the full potential of the medical tourism market is somewhat uncertain, the industry is not likely to subside at any time in the near future, especially when so many people lack the funds or insurance necessary to obtain medical treatment. Rather, the phenomenon of shopping abroad for medical care is only likely to expand and play a major role in the development and globalization of health care. By 2012, the medical tourism industry is estimated to gross \$100 billion and will expectedly expand even further after that.¹⁷⁰

A. EFFECTS OF THE GROWTH OF MEDICAL TOURISM

As mentioned above, the growth of medical tourism has the potential to actively reduce the cost of certain medical procedures in industrialized nations so that they are able to compete with the more inexpensive foreign destinations. Along with this increase in global competition should come improvement in the quality of health care services offered around the world.¹⁷¹

There is also a possibility that in some medical tourism destinations, medical professionals will be persuaded to leave the public sector and enter the private, thus leaving a shortage of skilled physicians for the general public.¹⁷² This would lead to damaging social costs for the destination country, as seen above with Cuba. But with the expansion of medical tourism, more of the foreign doctors trained in the United States and other industrialized nations will be able to return to their home country because of the new employment opportunities,¹⁷³ so the growth could be beneficial for many nations as well.

Of course, problems could arise if the bargain price of surgery persuades or induces more people to undergo unnecessary procedures or too many procedures all at once.¹⁷⁴ These “side effects” of surgery being accessible with such “ease” concerns many health care professionals.¹⁷⁵ Most importantly, more people are likely to be harmed. As mentioned above, this can be seen when individuals are persuaded by “package-deals” offered by foreign surgical centers or hospitals, or even when medical tourism agencies promote such deals. With any surgery comes risk, and when surgery is simply “too available,” more is likely to go wrong.¹⁷⁶ In addition, the rise of medical tourism will prompt further inquiries into

170. Herrick, *supra* note 41, at ii.

171. *Id.* at 28.

172. Caballero-Danell & Mugomba, *supra* note 10, at 21.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

national or international regulation, possibilities for health insurance carriers and purchasers, and alternative avenues for legal redress.

B. EFFORTS TO REGULATE THE INDUSTRY

As the medical tourism industry continues to grow, there will likely be more pressure to develop regulation or some sort of best practices to effectively deal with the legal and political implications mentioned above. While it is unlikely that there will be restrictive regulation, there is a good chance that some sort of best practices will be developed on a national, regional, or international level.¹⁷⁷ International organizations, such as the WTO or the United Nation's World Health Organization, may be best equipped to handle these issues¹⁷⁸ and should undertake a role in the process.

It is clear that any regulation of the medical tourism industry on either a national or an international scale should attempt to both emphasize the JCI or some other type of international accreditation system and steer people to only those hospitals that are approved—that way, foreign hospitals have an incentive to provide and follow high standards and safe practices.¹⁷⁹ Any such regulation or guide should also resolve the issues of jurisdiction between the patient's home country and the destination where the patient obtains medical services, especially since the absence of such a resolution serves as a constraint on the industry.¹⁸⁰ Additionally, any regulation or guide should address health insurance plans that cover medical tourism and specify how to deal with issues of complications if and when they arise.¹⁸¹ Finally, there should be development of a universal standard for maintaining patient privacy and confidentiality so that all hospitals are encouraged to reasonably protect such information.¹⁸²

These types of regulations would adhere to more of a best-practices approach and likely would not impair the internationally recognized right to basic health care needs. Instead, this approach would merely (but importantly) encourage safety and due diligence among doctors, hospitals, and even patients, and would serve many important governmental and international interests. For example, such a scheme would "help ensure [equitable] access to quality care . . . by maintaining a health care alternative in low-cost international hospitals, as well as reduce some of the strain on public resources for the uninsured as some procedures will be more affordable."¹⁸³

International and regional trade agreements also have the potential to affect medical tourism in the future. While the GATS agreement mentioned above has the potential to affect medical tourism, the issue of

177. See Burkett, *supra* note 15, at 242-43.

178. See Awadzi & Panda, *supra* note 77, at 80.

179. Burkett, *supra* note 15, at 242-43.

180. Caballero-Danell & Mugomba, *supra* note 10, at 25.

181. Burkett, *supra* note 15, at 243.

182. Arunanondchai & Fink, *supra* note 80, at 28.

183. Burkett, *supra* note 15, at 244.

whether medical tourism will be significantly involved in GATS negotiations is likely to remain an open question in the near future.¹⁸⁴ On the one hand, the agreement is “likely to increase cross-border trading of services and, as a result, stimulate cross-border recognition of professional licensure.”¹⁸⁵ This would improve the overall range and quality of health services offered in each country. On the other hand, there are risks that such commitments in the agreement would increase the inequities in access to health services,¹⁸⁶ almost invariably creating a two-tier medical system such as that in Cuba.¹⁸⁷ So long as such an approach does not go too far and does not encroach on any foreign country’s sovereignty,¹⁸⁸ it will likely liberalize both medical tourism services and the cross-border movement of health care workers.¹⁸⁹

Since medical tourism presents such a wide range of policy issues, some sort of regulation or best practices guide is essential. Any such regulation should also address the issues of permitting medical insurance that either allows or requires patients to undergo surgery abroad and the legal redress avenues patients should be allotted when something goes wrong,¹⁹⁰ issues which are more fully discussed below.

C. EFFECTS ON HEALTH CARE INSURANCE

The growth of the medical tourism market is likely to cause more pressure on insurance companies to cover international surgery. One attempt to deal with both the insurance dilemma and the legal recourse issue has been to offer medical malpractice insurance coverage by contract, and insurance companies such as AOS Assurance Company Limited currently provide such services.¹⁹¹ Under the AOS plan, patients may obtain up to \$100,000 of coverage for a face-lift for a low \$225, provided that they obtain the procedure in an accredited hospital by an accredited doctor.¹⁹²

As more of these companies emerge, patients are less likely to feel the uneasiness associated with uncertain legal recourse and are more likely to obtain surgeries abroad. Under these plans, patients will have the ability to pay for separate insurance coverage when either their own insurance policy does not allow for international treatment or when the patient sim-

184. See generally, *Sectoral and Cross-Cutting Briefings for Meetings in Geneva Between a Number of Civil Society Organizations and Member State Delegations to the World Trade Organization*, 5 (2005) [hereinafter *Sectoral and Cross-Cutting Briefings*].

185. Terry, *supra* note 11, at 467.

186. *Sectoral and Cross-Cutting Briefings*, *supra* note 184, at 5; see also Arunanondchai & Fink, *supra* note 80, at 2, 27 n.18.

187. See text accompanying note 122.

188. Arunanondchai & Fink, *supra* note 80, at 2.

189. Terry, *supra* note 11, at 466-67.

190. See Mirrer-Singer, *supra* note 127, at 231.

191. Herrick, *supra* note 41, at 19.

192. *Id.* If patients choose this option they or their beneficiaries are compensated for “lost wages, repair costs, out-of-pocket expenses, rehabilitation, severe disfigurement, loss of reproductive capacity and death” in the event that the procedure is botched. *Id.*

ply has little or no insurance at all.¹⁹³ As mentioned earlier, employers handling their own medical insurance are also likely to join in the cost savings and provide plans allowing for coverage for services obtained abroad. This would in turn allow the employers to combine medical and personal leave for their employees.¹⁹⁴

In addition, internet concierge services or medical tourism firms such as PlanetHospital are attempting to create low-cost health insurance plans that “combine American-based primary care with foreign travel for expensive procedures.”¹⁹⁵ These types of plans would further expand the options available for those seeking international health care and would likely aid in the overall expansion of the medical tourism industry and the globalization of health care.

But, if insurance companies and employers do not decide to offer such coverage for internationally-obtained services, there might be less of an incentive for individuals, especially Americans, to carry any health insurance at all.¹⁹⁶ Although medical tourism is usually a tool for the uninsured or underinsured, those with insurance could decide to forgo their coverage and simply save their cash in the event that surgery or other care is needed.¹⁹⁷ So if insurance companies and employers are savvy, more of them will provide for the option of such coverage in their plans in the future.

D. OTHER EFFORTS TO PROVIDE AVENUES FOR LEGAL REDRESS

In the short term, it is possible that industrialized nations will search for ways to provide their citizens legal redress when they obtain standard care abroad. In the United States, courts might consider the possibility of holding the medical tourism firms or intermediaries liable for the negligent acts of the foreign providers they send their clients to.¹⁹⁸ Public policy could support such a transition in the law, especially considering that medical tourists are particularly vulnerable and that medical tourism agencies have a significant information edge over the patients, are the cheapest cost-avoiders, and are likely the only source of redress for such patients if complications arise without coverage by insurance.¹⁹⁹

Holding these intermediary firms liable would certainly be easier in situations where a firm advertises medical expertise as part of their services. StarHospitals.net, a North American health care service, has attempted to do just that by opening the first call center operated exclusively by medical professionals.²⁰⁰ The Vice President, Kumar

193. *Id.*

194. Awadzi & Panda, *supra* note 77, at 79.

195. Herrick, *supra* note 41, at 21.

196. See Klaus, *supra* note 24, at 244.

197. See *id.*

198. See Mirrer-Singer, *supra* note 127, at 228-29.

199. *Id.* at 228.

200. *Star Hospitals Launches First Medical Tourism Call Center Staffed Entirely by Doctors, Physician Assistants and Paramedics*, CENTRE DAILY TIMES, Feb. 25, 2008,

Jagadeesan, claims that their “team of medical professionals—not simply travel agents—gives patients valuable information and guides them through their entire medical tourism experience.”²⁰¹ He further claims that the organization “understand[s] the importance of post-procedural care” and “ensure[s] a smooth transition into the medical system in the patient’s home country by providing the patient with necessary medical information and maintaining contact after they return home.”²⁰² As intermediaries with these types of qualifications emerge and make these types of claims, courts would likely be more willing to hold them liable when negligence occurs.

The threat of liability would then push these agencies to practice due diligence in investigating and selecting hospitals and doctors and to only add the best foreign providers to their networks.²⁰³ The major downfall is that this increase in liability “could cripple the infant industry,” thereby causing the firms to pass the increased cost of providing these services to their clients, who may simply forgo the services when such costs are raised.²⁰⁴ But many medical tourists will likely feel more at ease if they know the firms may be held liable and therefore would probably be willing to pay the (likely insubstantial) increase in the cost of services to obtain the firm’s expertise.²⁰⁵ While it is unclear whether courts would eventually be willing to hold the intermediaries liable, it could prove to be a viable alternative if patients are not able to access some type of insurance coverage for their procedures.

VII. CONCLUSION

In a recent Deloitte consumer health report, it was reported that 39 percent of Americans would consider medical tourism for an elective surgery abroad if it was half the cost of the procedure in the United States and if the facility was equal in quality to U.S. facilities.²⁰⁶ In fact, just recently my own friend traveled to Panama to obtain extensive dental work for only \$600. He had been in pain for months because he did not have the necessary insurance to cover the cost of the \$6,000 procedure that a U.S. dentist quoted him. He saved thousands of dollars and is now pain-free and back in the United States.

Medical tourism provides access to health care for many individuals who might not otherwise be able to afford it, and for some people, this may mean the difference between life and death. The industry raises sev-

available at <http://www.reuters.com/article/pressRelease/idUS181732+25-Feb-2008+BW20080225>.

201. See Bye, *supra* note 4, at 30; Masucci & Simpson, *supra* note 45, at 11

202. *Id.*

203. See Mirrer-Singer, *supra* note 127, at 229.

204. *Id.* at 230-31.

205. *Id.* at 231.

206. Christopher Bowe, *Healthy US Interest in ‘Medical Tourism’*, FIN. TIMES, Feb. 19, 2008, available at <http://www.ft.com/cms/s/0/4b63074e-df39-11dc-91d4-0000779fd2ac.html>.

eral interesting questions and involves numerous legal implications and challenges, many of which are currently being addressed in the United States. Some of these concerns can be met with regulation or some sort of best practices approach that simultaneously recognizes the right of individuals to travel to obtain health care and promotes safety and due diligence in the practice. Certain insurance carriers and employers have already begun allowing for international coverage in their health care plans, and this phenomenon is likely to expand as more medical tourists question the issues of liability and recourse. With the current absence of viable legal recourse, courts might be willing to hold medical tourism agencies accountable when negligence occurs, especially when such firms advertise themselves as medical experts.

With the existing health insurance system in the United States failing to satisfy many Americans and the heightened availability of cheaper medical care in convenient countries in Latin America, the medical tourism market is only likely to grow. More individuals will travel to obtain medical care they otherwise could not afford, and the growth of this medical tourism market will play a major role in the globalization of health care.